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SUPREME COURT, U.S.

No. 79-6866

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

ORIGINAL COPY

GERALD MASONE,

Appellant,

-against-

PHYLIS MASONE,

Appellee,

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS ~~THE APPEAL AND TO DENY CERTIORARI~~ OR, ~~IN THE ALTERNATIVE, TO~~ AFFIRM

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10/

Questions Presented

Whether review should be denied because the federal question posed herein does not appear on this record to have been raised properly and decided in State Court?

Assuming arguendo that the merits were decided by the Appellate Division, whether the writ of error herein is improperly taken from the Court of Appeals, which under New York law at most determined whether the issues were substantial enough for review and not whether they were correctly decided?

Whether review should be denied since no substantial federal question is presented?

Assuming arguendo that probable jurisdiction is found, whether the order below should be affirmed since appellant's objections are meritless?

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No. 79-6866

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

GERALD MASONE,

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-against-

PHYLIS MASONE,

Appellee,

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS THE APPEAL AND TO DENY
CERTIORARI OR, IN THE ALTERNATIVE, TO AFFIRM

Statement of the Case

The Attorney General of the State of New York, Intervenor-Appellee herein, moves to dismiss the appeal and to deny certiorari or, in the alternative, to affirm the April 3, 1980, order of the New York Court of Appeals, on the grounds that the questions posed herein were not raised properly and decided on the merits in State court, that if any court reached the merits, it was the intermediate appellate court and this appeal is wrongly taken from the Court of Appeals' order, that the federal questions raised are not substantial, and that, in any event, the appeal was correctly decided on the merits.

This Court on March 5, 1979, in Orr v. Orr, 440 U.S. 268 (1979), held Alabama's alimony statutes invalid under the Equal Protection Clause for permitting awards only to wives after a financial fact-finding directed toward both spouses. Two weeks later, this Court remanded Childs v. Childs, 440 U.S. 952 (1979), to the Second Department of the Appellate Division of the Supreme Court of the State of New York "for further consideration in light of Orr v. Orr", supra. Childs involved an equal protection challenge to New York's Domestic Relations Law (DRL) § 237(b)* which, literally read, authorizes counsel fee awards only to wives after a financial fact-finding directed to both husbands and wives.

On July 11, 1979, the Appellate Division, Second Department, rendered a decision in Childs on such remand, consolidated with other State appeals from orders entered therein, reported at 69 A D 2d 406. It upheld the constitutionality of DRL §§ 237(b) and 244* by reading them in tandem with other State statutes and in accordance with legislative intent to permit the award of counsel fees in matrimonial actions to husbands as well as to wives. The Appellate Division order remitted the proceeding to trial court for a hearing at which appellant could apply for counsel fees. Mr. Childs unsuccessfully sought further review by motion for leave to file a petition for mandamus, Childs v. Appellate Division, ____ U.S. ____, 100 S. Ct. 691 (1980), and by appeal, Childs v. Childs, app. dsmd., 48 N Y 2d 754 (1979), app. dsmd., cert. den. ____ U.S. _____, 100 S. Ct. 1824 (1980).

*The statutes are set forth in the Appendix to Appellant's Jurisdictional Statement.

Appellant herein seeks to challenge the constitutionality of DRL §§ 236, 237, 240, 244, 245, and General Obligations Law (GOL) § 5-311.* He had not raised any such challenge in trial court prior to the November 25, 1977, entry of its child support and alimony order, confirming a referee's report on arrears, ordering a wage assignment and granting counsel fees. Appellant first raised this challenge in the Appellate Division, First Department, by notice to the Attorney General dated October 5, 1979, long after this Court's decision in Orr and the Appellate Division, Second Department, decision in Childs. In the instant case, the Appellate Division, First Department, affirmed without opinion on January 22, 1980. 73 A D 2d 1067. Appellant then appealed as of right to the New York Court of Appeals which "dismissed..., sua sponte, upon the ground that no substantial constitutional question is directly involved" on April 3, 1980. 49 N Y 2d 916.**

On June 28, 1980, this Court docketed appellant's Jurisdictional Statement (hereinafter "J.S.").

*The statutes are set forth in the Appendix to Appellant's Jurisdictional Statement.

**The Court's order is set forth in full in Appendix to Appellant's Jurisdictional Statement. The order as published omits the grounds of decision.

Statutes Involved

The following statutes are set forth in the Appendix to Appellant's Jurisdictional Statement:

DRL §§ 236, 237, 240, 244, 245;

GOL § 5-311.

The following constitutional provisions and statutes are set out in the Appendix hereto:

United States Constitution, Amendment XIV, § 1;

28 U.S.C. § 1257;

New York Civil Practice Law and Rules (CPLR) Rule 2217(a), § 5514(a), § 5601(b)(1), § 5602(a)(1)(i);

New York Family Court Act (FCA) § 438.

POINT I

THE APPEAL SHOULD BE DISMISSED AND CERTIORARI DENIED BECAUSE THE FEDERAL QUESTION POSED HEREIN DOES NOT APPEAR ON THIS RECORD TO HAVE BEEN RAISED PROPERLY AND DECIDED ON THE MERITS IN STATE COURT. ASSUMING ARGUENDO THAT THE MERITS WERE DECIDED BY THE APPELLATE DIVISION, THE WRIT OF ERROR HEREIN WOULD RUN TO THAT COURT AND NOT TO THE COURT OF APPEALS, WHICH UNDER NEW YORK LAW AT MOST DETERMINED ONLY WHETHER THE ISSUES WERE SUBSTANTIAL ENOUGH FOR REVIEW AND NOT WHETHER THEY WERE CORRECTLY DECIDED.

The only Federal question posed herein is appellant's claim that the Courts below violated this Court's mandate by not holding unconstitutional several New York support laws. The

other claims were either not raised below or are not federal questions. See pp. 8-10 infra.

As to appellant's challenge to State statutes, under 28 U.S.C. § 1257* this Court may only entertain appeals or grant certiorari from "Final judgments or decrees rendered by the highest court of a state in which a decision could be had..." The appeal herein is from an order of New York's highest court, but that order held that "no substantial constitutional question is directly involved" within the meaning of the State jurisdictional statute, CPLR § 5601(b)(1), and appeal as of right therefore did not lie. The Attorney General submits that review of that order does not lie because the constitutional issue was never directly involved in this action so as to be reviewed on the merits below or in this Court, pp. 5-6 infra, and because if the Court of Appeals dismissed for lack of substantiality, its order was not a ruling on the merits and this appeal should instead have been from the Appellate Division's order, p. 7 infra.

New York appellate courts will ordinarily refuse to consider constitutional arguments that were not directly involved in the order under review and are being raised for the first time on appeal. See DiBella v. DiBella, 47 N Y 2d 828, 829 (1979); Karp v. Karp, 70 A D 2d 813 (1st Dept. 1979); Emmer v. Emmer, 69 A D 2d 850, 851 (2nd Dept. 1979). If the Appellate Division, First Department, had ruled on the constitutional issue herein, it surely would have said so since it was a matter of first impression in New York as to most of the statutes. When the same court upheld

*The statute is set forth in the Appendix hereto.

FCA § 438*, counsel fees in support proceedings, under an Orr challenge by reading it as gender-neutral, it did so in a written opinion, Matter of Goldberg v. Aylward, 72 A D 2d 510 (1st Dept. 1979). It thus appears that the State courts below did not pass on the challenge to the statutes.

It is not claimed that appellant was deprived of a "fair opportunity", Orr v. Orr, supra, 440 U.S. at 275 n.4, to raise his constitutional challenge in trial court. As a result, although he did raise the challenge on appeal, it had not become "necessarily involved", Columbia Water Power Co. v. Columbia Elec. St. R.R. Light & Power Co., 172 U.S. 475, 488 (1899), in the action so as to require appellate review.** This Court has "no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' [Crowell v. Randell,] 10 Pet. [35 U.S.] 368, 391 [1836]." Cardinale v. Louisiana, 394 U.S. 437, 438 (1969) (emphasis added). Since the merits of the constitutional issue were not properly raised in State court and do not appear on the record to have been decided below - indeed, the record suggests they were not passed on -, nor were they tacitly but necessarily involved, this Court lacks jurisdiction.

*The statute is set forth in the Appendix hereto.

**If the constitutional issue was necessarily involved in the Appellate Division's decision although not raised in trial court, an appeal as of right lay to the Court of Appeals. In Jongebloed v. Erie R.R. Co., 271 App. Div. 815 (1st Dept. 1946), aff'd 297 N Y 534 (1947), cert. den. 333 U.S. 855 (1948), plaintiff had pleaded several New Jersey statutes. The trial court directed a verdict for defendant by taking judicial notice of the foreign statutes and ruling on them as a matter of law. On appeal, plaintiff for the first time argued that foreign law was a factual issue which could not be removed from the jury without depriving him of his constitutional guarantee of trial by jury. The Court of Appeals held that the Appellate Division's affirmance "necessarily involved" the constitutional issue and entitled him to appeal as of right, 296 N Y 912 (1947), apparently because the appellate court could not have decided whether the trial court properly applied the law without also deciding whether the trial court properly and constitutionally chose the law to be applied. As will be shown, p. 9 infra, the Appellate Division did not have to pass on the constitutional issue herein in order to approve the trial court's order.

Assuming arguendo that the constitutional issue was sufficiently involved to be reviewed (and rejected) on the merits by the Appellate Division, then the Court of Appeals presumably dismissed for lack of substantiality. This may be

> "one of those not infrequent cases in which decision of the merits of the case also determines jurisdiction". Matthews v. Huwe, 261 U.S. 262, 265 (1925).

Dismissal for lack of substantiality is based on summary review and has no greater precedential weight in New York than a denial of certiorari by this Court; it "has not the force of an affirmance after jurisdiction has been taken", Matter of Marchant v. Mead-Morrison Mfg. Co., 252 N Y 284, 298 (1929) (Cardozo, J.), app. dsmd. 282 U.S. 808 (1930).* It is far from the "affirmance in express terms", Norfolk & Surburban Turnpike Co. v. Virginia, 225 U.S. 264, 269 (1912), required for review by this Court. Assuming that the constitutional issue was properly raised and preserved for this Court's review, the writ of error would run to the last State court to pass squarely on that issue, the Appellate Division. Ibid. It is noteworthy that each of the appeals to this Court in Orr and Childs was taken from the intermediate appellate court's order and not from the order denying review thereof by the State's highest court. The appeal herein must be dismissed since it is taken from the Court of Appeals' order.

POINT II

THE APPEAL SHOULD BE DISMISSED AND CERTIORARI DENIED SINCE NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

Four possible claims are discernible in Appellant's Jurisdictional Statement. None presents a substantial federal question for review in this Court.

*Although made in the context of denial of a discretionary non-constitutional appeal, Mr. Justice Cardozo's statement is applicable herein since the scope of review and substantiality requirements for constitutional questions are the same on discretionary and mandatory appeals. Cohen & Karger, Powers of the New York Court of Appeals, § 55(c) at 252-3. To the extent that the availability under CPLR §§ 5514(a), 5602(a)(1)(i), of a discretionary appeal after dismissal of a mandatory one allows appellant a second chance to convince the Court of Appeals that his constitutional challenge is substantial, appellant has not exhausted his State appellate remedies. This Court "[is] not to assume that an appeal would not have been granted if applied for. The record must show its refusal." Fisher v. Perkins, 122 U.S. 522, 527 (1887).

Appellant's first claim is that the refusal of the courts below to hold several gender-based New York matrimonial statutes unconstitutional violates the mandate of this Court in Orr and Childs (J.S. 1-2). But the order of remand in Childs v. Childs, supra, 440 U.S. at 952, merely required the Appellate Division, Second Department, to give "further consideration [to the proceeding] in light of Orr v. Orr," supra. The Orr Court had suggested that State courts could save the constitutionality of support statutes by reading them in a gender-neutral manner.* The Courts below may have reviewed his constitutional claim and rejected it because the statutes could be read in a gender-neutral manner, as Orr itself suggested, see n."*" infra.

The Orr Court also clearly indicated, 440 U.S. at 275 & n. 4-5, that its decision could be limited to prospective effect. The Courts below thus may have refused to accept appellant's constitutional claim as untimely. See p. 5 supra. If so, that was within the Orr Court's contemplation and beyond this Court's jurisdiction now to review, 440 U.S. at 274.

Appellant's second claim is that since Orr and Childs, "the laws have been changed but the appellant has been subjected to the old law without benefit of the new [and] thereby denied due process and equal protection guarantees". (J.S. 2). It does

*The Orr Court noted, 440 U.S. at 272, that State alimony laws could be amended to be gender-neutral by legislative action, but it also suggested judicial reinterpretation of the laws by citing Stanton v. Stanton (I), 421 U.S. 7 (1975). On its second hearing of the Stanton case, this Court specifically read its first decision to require a State's highest court to apply its statute in a gender-neutral manner by reading it in light of the common law or recent legislative intent. Stanton v. Stanton (II), 429 U.S. 501, 504 n. 4 (1977).

This Court, moreover, has refused to review the State court decisions on remand, holding the statutes constitutional by reading them as gender-neutral, despite claims the decisions violate the Orr Court's mandate. Orr v. Orr, 374 So. 2d 895 (Civ. App.), writ den. 374 So. 2d 898 (Ala.1979), app. dsmd., cert. den. ___ U.S. ___, 100 S.Ct. 993 (1980); Childs v. Childs, supra; Childs v. Appellate Division, supra.

not appear from the record that appellant raised this claim below. The order appealed from was entered before the legislation rendering gender-neutral the statutes challenged herein, Chapter 281 of the Laws of 1980, passed the Legislature and was sent to the Governor. If the change of law referred to is the decision in Childs v. Childs, supra, 69 A D 2d at 420, to allow the husband a hearing de novo in trial court on counsel fees, appellant never cited that decision nor asked for a hearing de novo in the State Courts below. Under Cardinale v. Louisiana, supra, the change of law issue cannot be reviewed here since it has not been shown that it was raised or passed on in State Court.

Even assuming that appellant's second claim was reviewed below, the Appellate Division's affirmance of the trial court's order shows that it reviewed that court's findings of fact as to the relative financial circumstances and needs of the parties. The same findings would form the basis of decision whether DRL § 237 is read to authorize awards only to wives, as it literally read and was applied at the time of the trial court's decision, or if it is read in a gender-neutral manner, as under Childs. The Appellate Division thus could determine from the record before it that the award herein appealed was proper under DRL § 237, literally read or judicially interpreted, and affirm. See Karp v. Karp, supra; Emmer v. Emmer, supra. Appellant has not made the "very obvious and exceptional showing of error" needed before this Court will "undertake to review concurrent findings of fact by two courts below..." Graver v. Tank & Mfg. Co., 336 U.S. 271, 275 (1949).

Appellant fails even to designate which of his constitutional rights were violated in his last two claims. As to his

objection to "multitudinous judges at the trial term" (J.S. 2), when appellant raised the same argument below, the appellee wife pointed out that appellant had failed to appeal from several of the orders to which he was now referring and that he had never objected to having the various motions in this matter heard by different judges, although under CPLR 2217(a) he could have requested they be heard by the original trial judge. Brief for Defendant-Respondent, Point Three at 43-44, Masone v. Masone (1st Dept.). Appellant's Reply Brief did not controvert these factual assertions or argue why his failure to make timely objection should be excused. The parties' briefs show, moreover, that the motion whose decision is appealed herein was heard by a single judge (with a referee assisting), and by no other, which is all appellant was statutorily entitled to receive.

Finally, appellant asserts that one of the referees who heard the matter had not been duly appointed. (J.S.2). When he raised this claim below, Brief for Appellant, Point III at 21, his wife argued that the referee was properly appointed but did not dispute that the objection would be fatal to jurisdiction if proven, Brief for Defendant-Respondent, supra, Point Four at 45. Appellant's Reply Brief at 4 refuted his own claim by showing that the trial justice who ruled that the referee was duly appointed was the appointing authority and in a position to know what he had done. The concurrent findings of fact on this issue of the trial court and the Appellate Division are thus not clearly wrong.

In sum, appellant's first claim is not substantial because the Courts below in no way violated this Court's mandate in Orr

and Childs. His other three claims are basically "mere error in deciding questions" of the application of State law to facts and thus do not present a Federal question for this Court's review. New Orleans Waterworks Co. v. Louisiana, 185 U.S. 336, 352 (1902).

POINT III

ASSUMING ARGUENDO THAT PROBABLE JURISDICTION IS NOTED HEREIN, THE COURT SHOULD AFFIRM.

Assuming arguendo that probable jurisdiction is found by this Court, the Court should affirm. Appellant's objections to the order below are meritless.

It is unrefuted that appellant failed to object to the referral of motions to new judges or to ask himself that they be referred to a single judge. It further appears from appellant's papers that the sole motion appealed was heard in its entirety by one judge. See pp. 9-10 supra. The concurrent findings of two courts below, including the appointing court, establish that the referee objected to was properly appointed. See p. 10 supra. Under Orr the Courts below could properly have refused to review his untimely constitutional challenge to the statutes, while if they did review the claim, they could read the statutes as gender-neutral. See p. 8 supra. Having done so, the Courts below could reasonably find that under the financial circumstances of the private parties, as established by two courts' concurrent fact findings, the same award would have been made under the statutes however read. See p. 9 supra. Appellant's belated change of law issue was not raised below and is unreviewable now. See pp. 8-9 supra.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED AND CERTIORARI DENIED. IN THE ALTERNATIVE, THE ORDER BELOW SHOULD BE AFFIRMED.

Dated: New York, New York
July 25, 1980

Respectfully submitted,

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Appendix

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

28 U.S.C. § 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a state" includes the District of Columbia Court of Appeals.

Civil Practice Law and Rules, Rule 2217

(a) Prior Motion. Any motion may be referred to a judge who decided a prior motion in the action.

* * *

Civil Practice Laws and Rules, § 5514.

(a) Alternate method of appeal. If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in Section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

* * *

Civil Practice Law and Rules, § 5601.

* * *

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the State or of the United States;...

* * *

Civil Practice Law and Rules, § 5602.

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

1. in an action orginating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right....

* * *

Family Court Act, § 438.

In any proceeding under this article by a wife or former wife, against her husband, or former husband, including proceedings for herself and her children, or by a person on behalf of children only, or at any hearing to modify or enforce an order entered in that proceeding or a proceeding by a husband or former husband to modify a decree of divorce, separation, or annulment, including an appeal under article ten the court may allow counsel fees at any stage of the proceeding, to the attorney representing the wife, former wife or person on behalf of children.